(8)

No. 97-8629

In The

Supreme Court of the United States

October Term, 1998

EDDIE RICHARDSON,

Petitioner,

v.

UNITED STATES OF AMERICA

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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24 pp

QUESTION PRESENTED

This Court has limited its grant of certiorari to the following question:

Whether the district court committed reversible error in failing to instruct the jury that it must agree unanimously on which particular drug violations constituted the "series of violations" required for conducting a continuing criminal enterprise in violation of 21 U.S.C. §848.

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BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers is a District of Columbia non-profit corporation with a membership of more than 10,000 attorneys and 28,000 affiliate members in fifty states. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates. NACDL was founded in 1958 to promote study and research in the field of criminal defense law; to disseminate and advance knowledge of the law in the area of criminal practice; and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. Among NACDL's objectives are to promote the proper administration of justice.

This case raises important questions concerning the special considerations applicable to the prosecution and defense of such unique compound complex federal crimes as the Racketeer Influenced and Corrupt Organizations Act (18 U.S.C. §1961 *et seq.*) and the Continuing Criminal Enterprise statute (21 U.S.C. §848). In particular, the Court must examine the constitutional implications applicable to the requirement of jury unanimity with respect to the underlying criminal acts

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[1] Both parties have consented to NACDL's appearance as *amicus curiae* in this matter. No counsel for any party has authored this brief in whole or in part and no person or entity, other than *amicus curiae*, has made a monetary contribution to the preparation or submission of this brief. Sup. Ct. Rule 37.6.

required to be found in order to constitute the "series of violations" which is a necessary element of a CCE violation — a statutory element analogous to the "pattern of racketeering activity" required to be found under the RICO statute.

SUMMARY OF ARGUMENT

In re Winship, 397 U.S. 358, 364 (1970), mandates that each element of a criminal offense must be proven beyond a reasonable doubt. In federal courts, the jury must agree unanimously that the prosecution has met this burden as to each element of a federal criminal offense. *Johnson v. Louisiana*, 406 U.S. 356, 369 (1972)(Powell, J., concurring)("In an unbroken line of cases reaching back to the late 1800's, the Justices of this Court have recognized, virtually without dissent, that unanimity is one of the essential features of the federal jury trial")(collecting cases).

This case revisits, in the context of a federal criminal statute, an issue addressed most recently in *Schad v. Arizona*, 501 U.S. 624 (1991) — *viz.* the level of factual specificity on which the jury must be unanimous before it may convict of a compound-complex federal crime containing multiple factual and legal elements.[2] Notwithstanding *Schad*, a state prosecution involving the distinction between premeditated and felony-murder, the federal question remains anything but

[2] "Compound-complex criminal statutes generally target large-scale criminal activity by requiring that a defendant have engaged in a 'pattern' or 'series' of criminal conduct. The 'pattern' or series' must consist, in turn, of a specific number of predicate acts defined elsewhere in the criminal code." Eric S. Miller, Note, *Compound-Complex Criminal Statutes and the Constitution: Demanding Unanimity as to Predicate Acts*, 104 Yale L.J. 2277, 2278 (1995).

clear. *See, e.g., United States v. North*, 910 F.2d 843, 873-75 (D.C. Cir. 1990)("in order to return a unanimous verdict of guilty on a count involving multiple distinct underlying acts, jurors are required to be unanimous as to the specific act by which the defendant violated the law"); *United States v. Beros*, 833 F.2d 455, 462 (3d Cir. 1987)(Higginbotham, J.)("When the government chooses to prosecute under an indictment advancing multiple theories, it must prove beyond reasonable doubt at least one of the theories to the satisfaction of the entire jury"); *United States v. Peterson*, 768 F.2d 64, 67 (2d Cir. 1985)(Friendly, J.)(*accord*).

Under the Continuing Criminal Enterprise statute (21 U.S.C. §848), the government must prove that the defendant committed a felony violation of the federal substantive narcotics laws as well as proving that this violation was part of a "continuing series" of violations.[3]

The critical question, then, is whether the jury must agree unanimously merely that the defendant committed any

[3] While Congress never defined the term "continuing series", the lower courts are largely in agreement that the term means three or more violations of the substantive narcotics laws. *See, e.g., United States v. Edmonds*, 80 F.3d 810, 814 (3d Cir. 1996)(*en banc*); 2 Edward J. Devitt *et al.*, *Federal Jury Practice and Instructions* §55.05 (4th ed. 1990 & Supp. 1998)(collecting cases by circuit).

The only exception is the Seventh Circuit. *United States v. Baker*, 905 F.2d 1100, 1105 (7th Cir. 1990)(two substantive predicates, not including conspiracy). However, as one commentator has noted, the *Baker* court's disagreement is more over form than substance. Cyrus Amir-Mokri, Comment, *Predicate Offenses and Jury Agreement Under The Continuing Criminal Enterprise Statute*, 1994 U. Chi. Legal F. 325, *id.* at n.5, 338 n.88.

three charged or uncharged narcotics-related violations or whether they must agree unanimously on the same three violations.

On its face, the CCE statute gives little indication of its intent with respect to jury unanimity. Nevertheless, guided by historical tradition, constitutional considerations and the rule of lenity, applicable where a criminal statute is ambiguous on its face, it is manifest that a compound-complex criminal statute that incorporates formerly separate crimes — crimes that may take place at different times and different places — should generally be read to require jury unanimity as to each predicate offense. *Edmonds*, 80 F.3d at 815.

In order to resolve due process concerns, Congress decided against the original recidivist sentencing bill — which would have allowed draconian sentence enhancement based on uncharged conduct — and passed instead a substantive CCE offense which had to be tried to a jury. Congress subsequently approved sentencing guidelines which equally penalize (a) separately-charged drug offenses serving double-duty as "continuing series" crimes and (b) uncharged offenses offered solely to prove the CCE "series." This suggests that Congress indeed intended the predicate "series" crimes — even when not charged as separate offenses — to be treated as elements of CCE which must be found beyond a reasonable doubt by a unanimous jury; this is not unlike the multiple predicate acts that must be proven in order to sustain the "pattern of racketeering activity" required under the contemporaneously-enacted RICO statute.[4] Any other view of § 848 would closely

[4] RICO was enacted as part of the Organized Crime Control Act of 1970, Pub. L. 91-452, 84 Stat. 922. The CCE statute was enacted as part (continued...)

resemble Congress' rejected recidivist statute, whereby a defendant could be sentenced as a drug kingpin for uncharged crimes and without the due process afforded by a unanimous jury verdict.

Moreover, the Due Process Clause of the Fifth Amendment and the Sixth Amendment right to a unanimous jury verdict in federal court require the "continuing series" crimes to be treated as an element of the CCE offense which must be agreed upon by the jurors. CCE is a uniquely modern, "compound-complex" federal statute, with no roots in history. A historical analogue, however, may be found in statutes held unconstitutionally vague because of the multiple and disparate means by which the offense could have been committed. Furthermore, the practice of treating the "continuing series" crimes as separately-charged substantive offenses in the indictment is wide-spread policy in at least four circuits.

Accordingly, Fifth Amendment due process requirements demand that juries agree unanimously upon the specific predicate offenses necessary for a compound-complex felony conviction. On a functional level, this constitutional prescription requires district judges to issue specific unanimity instructions to juries whenever the prosecution presents evidence of more than the requisite number of predicate acts, irrespective of whether the predicates are pleaded in the indictment as separate substantive offenses. In addition, the use of special interrogatories at the time of verdict would give meaning to this constitutional protection without destroying the

[4](...continued)
of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. 91-513, 84 Stat. 1236.

additional protection a general verdict affords criminal defendants.

ARGUMENT

CONGRESSIONAL INTENT AND PRINCIPLES OF DUE PROCESS REQUIRE JURY UNANIMITY ON EACH OFFENSE ALLEGED TO BE PART OF THE "CONTINUING SERIES" OF VIOLATIONS UNDER §848

21 U.S.C. § 848(c) provides, in pertinent part:

> [A] person is engaged in a continuing criminal enterprise if–
>
> (1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony; and
>
> (2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter. . .

A. Congress Intended Juries to Agree on the Offenses Constituting a "Continuing Series" Whether Or Not Charged As Separate Offenses In The Indictment.

"The question whether statutory alternatives constitute independent elements of the offense . . . is a substantial question of statutory construction." *Schad,* 501 U.S. at 636. The relevant legislative history and subsequent developments here

strongly suggest that Congress intended each crime which is part of the "series" to be treated as an element of the CCE offense. If this is so, "patchwork verdicts" are forbidden.[5]

In *Garrett v. United States*, 471 U.S. 773 (1985), this Court reviewed the Congressional debate as to whether the CCE should be a mere recividist sentencing provision or a substantive offense, *id.* at 782-785, and concluded that Congress "intended CCE to be a separate offense and . . . to permit prosecution for both the predicate offenses and the CCE offense." *Id.* at 786.

The outcome of this debate and the move away from a CCE as mere sentence enhancement was driven by concerns for the due process rights of the accused. Redrafting of the House bill which ultimately prevailed in Congress was in large part a response to "constitutional criticism and to suggestions going to due -- and fair -- process." H.R.Rep. No. 91-1444, *reprinted in* 1970 U.S.C. C.A.N. 4566, 4648 (Additional Views). The CCE provision, specifically, had been redrafted because of "serious objections" on constitutional grounds to the enhanced sentencing procedures, including provisions for keeping certain evidence secret from the defendant and shifting the burden of proof to him on a key element. *Id.* at 4650-4651.

The end result "made engagement in a continuing criminal enterprise a new and distinct offense with all its elements triable in court." *Id.* at 4651. Even with the traditional due process protections of a criminal trial in place, however, the writers of additional views on the final bill

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[5] A "patchwork verdict" results "by piecing together the jurors' different conceptions of the predicate acts that satisfy the continuing series element of the offense." Miller, 104 Yale L.J. at 2282.

nonetheless expressed continued dismay over the vagueness of the provision in issue here:

> The definition of what is a continuing offense is indefinite in that . . . *[i]t is not at all clear what constitutes a "continuing series of violations of this title or title III * * *."* Suppose, for instance, that six young men attending a college reside together in a cooperative boarding house. All of them have engaged in the practice of smoking marihuana cigarettes and there has been, on a day or more, free exchange between them of such forbidden drug. Each incident of giving a cigarette to another constitutes a felony. How long must this practice continue in order to constitute a "continuing series of violations"? Would a single day's experiment with smoking "pot" constitute a continuing series of violations," or would it require a week, a month, or a year of such activities to make the offenses "continuing"?

Id. at 4651.

The bill passed with no further clarification. What was clear, however, was that Congress had rejected an approach that allowed uncharged conduct to be considered merely as evidence to be weighed at the time of sentencing, and that Congress did so because of serious concerns about due process. 116 Cong. Rec. 33,361 (remarks of Rep. Eckhardt).[6]

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[6] A short discussion of the legislative history, amplifying this Court's discussion in *Garrett*, may be found in Katherine L. Harvey, Note, (continued...)

Whether Congress intended to allow juries to create a patchwork of "series" crimes, however, has been further illuminated by its review and acceptance of the United States Sentencing Commission Guidelines applicable to a CCE and its predicate offenses.[7] The Guidelines themselves "have the force and effect of laws." *Mistretta v. United States*, 488 U.S. 361, 413 (1989) (Scalia, J., dissenting).

By virtue of the "relevant conduct" and "grouping" provisions, the Guidelines make no distinction for purposes of sentencing between drug crimes charged as separate substantive offenses and also offered as CCE "series" crimes, as in *Garrett*, and drug crimes introduced, as here, solely to prove the "series." The base offense level for determining the guideline sentencing range is "predicated in large part on the amount of drugs involved," which in turn is predicated on all acts by the defendant which "'were part of the same course of conduct or common scheme or plan as the offense of conviction,' whether or not charged in the indictment." *United States v. Sklar*, 920 F.2d 107, 110 (1st Cir. 1990); U.S.S.G. §§ 1B1.3(a)(2), 3D1.2(d). In a CCE prosecution, the CCE and its "series" crimes — whether or not separately-charged offenses — are then grouped for purposes of aggregating the quantity of drugs. *United States v. David*, 940 F.2d 722, 741 (1st Cir. 1991).

Since Congress expressly rejected, on due process grounds, the CCE recidivist sentencing bill, its approval of

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[6](...continued)
United States v. Canino and the Continuing Criminal Enterprise: Do Drug Kingpins Have a Right to Specific Juror Agreement?, 15 W. New Eng. L. Rev. 271, 274-76 (1993).

[7] Federal Sentencing Guidelines Manual, 1998 Edition, Ch. 1, Pt. A(2), p. 1 (1997); 28 U.S.C. § 994(p) (process for Guidelines approval).

these guidelines strongly suggests an intent that any crime used to prove a "series" – whether or not charged in a separate count — must be treated as a distinct element of § 848. Otherwise, a CCE tried and sentenced -- as here -- on predicates not separately charged comes uncomfortably close to the rejected scheme whereby a defendant's sentence could be enhanced "without his knowing what the evidence against him was." 116 Cong. Rec. 33,630 (1970) (remarks of Rep. Eckhardt). Equally incongruous is the idea that Congress -- demonstrably concerned about providing the maximum process due in a CCE prosecution — would, on the one hand, approve sentencing guidelines which treat "series" crimes the same, whether or not separately charged, and, on the other hand, have no problem with a "series" crime being treated as an element of a CCE only if the prosecutor chooses to charge it as a separate count. Making CCE a crime, rather than a mere sentence enhancement, was intended to give prosecutors less, not more, control over the burden of proof.

To the extent that the language and legislative history of the CCE statute do not conclusively demonstrate Congress' intent with respect to specific unanimity on the predicate offenses, principles underlying the rule of lenity as it applies to ambiguous federal criminal statutes dictates that the statute be construed in defendants' favor on this crucial question. *See, e.g., Bifulco v. United States*, 447 U.S. 381, 387 (1980); *United States v. Bass*, 404 U.S. 336, 347-48 (1971); *Ladner v. United States*, 358 U.S. 169, 178 (1958). Accord, *United States v. Edmonds*, 80 F.3d at 820-821 (rule of lenity requires construction of CCE statute requiring specific unanimity).

Accordingly, this Court must conclude that Congress intended each of the crimes constituting a "series of offenses" must be treated as an element and thus must be found by a

unanimous jury beyond a reasonable doubt. *In re Winship*, 397 U.S. at 364.

B. If Congress Did Not Intend the Predicates of a "Continuing Series" to be Treated as Elements of the CCE Offense, the Fifth and Sixth Amendments Nonetheless Require Such Treatment.

The Due Process Clause of the Fifth Amendment and the right to a jury trial guaranteed by the Sixth Amendment "require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged beyond a reasonable doubt." *United States v. Gaudin*, 515 U.S. 506, 509-510 (1995). The question is whether each crime necessary to prove a "series" must be viewed, because of due process considerations, as a "fact necessary to constitute the crime with which [the defendant] is charged." *Winship*, 397 U.S. at 361-64.[8]

History — the first due process factor in *Schad* — has only limited relevance here. As this Court noted, "history will be less useful as a yardstick in cases dealing with modern statutory offenses lacking clear common-law roots than it is in cases . . . that deal with crimes that existed at common law." *Schad*, 501 U.S. at 640 n.7. The CCE statute is a uniquely modern product of our times, addressing the problem of

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[8] *Winship*'s holding under the Fourteenth Amendment was compelled by Fifth Amendment due process analysis and historical practice.

ongoing, large-scale traffic in illegal drugs.[9] The "series" provision, originally part of a recidivist sentencing statute, was ultimately passed as an element of the offense whose purpose was to elevate a primary felony (21 U.S.C. §848(c)(1)) to a super-felony with greatly enhanced penalties. In a very concrete sense, this is an example of Congress doing what this Court recently doubted it had ever done: making "a defendant's recidivism an element of an offense where the conduct proscribed is otherwise unlawful." *Almendarez-Torres v. United States*, 118 S. Ct. 1219, 1231 (1998).

To the extent that this statute does have "a historical analogue," one commentator has noted, "it is in the broadly defined common law crimes that courts have long since declared unconstitutionally vague." Miller, 104 Yale L.J. at 2298-99 & n.111, *citing, e.g., State v. Palendrano*, 293 A.2d 747, 748 (N.J. Super. Ct. Law Div. 1972) (holding unconstitutionally vague the common law crime of being a "common scold," which could consist of "brawling,

[9] It should be remembered that *Schad's* due process analysis was constrained by this Court's deference to state law in cases arising under the Fourteenth Amendment. 501 U.S. at 638-639; *Medina v. California*, 505 U.S. 437, 445-446 (1992). That analysis thus rested in large part on "historical and contemporary acceptance of Arizona's definition of the offense" of murder, including treatment of the offense at common law, *id.* at 640-41, and 648-51 (Scalia, J., concurring). By contrast, the present case involves a modern, compound-complex federal statute: a *sui generis* creature of Congress. *Liparota v. United States*, 471 U.S. 419, 424 & n.6 (1985) (while federal crimes are "solely creatures of statute," Congress must "act within any applicable constitutional restraints in defining a criminal offense"). This Court's duty when measuring a federal criminal statute by the standards of the Due Process Clause of the Fifth Amendment is not tempered -- as it was in *Schad* -- by any deferential federalism concerns.

wrangling, breaking the public peace, increasing discord, and/or being a nuisance"). History — and historical concerns about specificity discussed later in this section — favors treatment of "series" crimes as elements.

The second *Schad* factor, "widely shared practice," 501 U.S. at 637, also favors jury unanimity on the "series" crimes. In addition to the Third Circuit requiring unanimity — *Edmonds*, 80 F.3d at 822 — three other circuits have model charges assuming that "series" crimes are separately charged offenses.[10] These model instructions are indicative of the fact

[10] Pattern charges for a "continuing series" in these circuits are reproduced in 2 Edward J. Devitt *et al.*, *Federal Jury Practice and Instructions* § 55.05 at 377 (4th ed. Supp. 1998), as follows:

> The [indictment charges] [Government contends] that the [violations *charged in Counts ___ and ___*] [defendant's previous convictions] for (list convictions)] are part of the series of three or more violations. [*You must unanimously agree on which three violations* constitute the series of three or more violations in order to find that essential element No. Two has been proved.]" Manual of Modern Criminal Jury Instructions for the District Courts of the Eighth Circuit, Instruction No. 6.21.848A (1996) (emphases added).
>
> A "continuing series of violations" means at least three violations of the Controlled Substances Act *as charged in Counts _* of the indictment, and also requires a finding that those violations were connected together as a series of related or ongoing activities as distinguished from isolated and disconnected acts. In this case, a 'continuing series' means at least three of the violations *alleged in the ___ counts of the indictment*. Pattern Jury Instruction of the District Judges Association of the Fifth Circuit, Instruction No. 2.84 (1990) (emphases added).

(continued...)

that many prosecutors throughout the country routinely charge "series" crimes as separate substantive counts, a practice which automatically confers on each "series" crime separate consideration as an element.

An additional due process factor in *Schad*, as applied here, is an evaluation of the "moral and practical" equivalence of the various crimes which can make up a "series." This test strongly favors unanimity; the range of possible predicates is vast and varied in degrees of blameworthiness. In a large-scale drug trial where evidence of myriad crimes — not separately charged — is introduced to prove the "series," it is perfectly conceivable that juror A could predicate a "series" on one count of simple possession of a few grams of cocaine base, 21 U.S.C. § 844, and two counts of making a telephone call to facilitate possession of these same few grams, 21 U.S.C. § 843(b); while juror B would base her verdict on three different counts of importing boatloads full of heroin. 21 U.S.C. §960(a).

Finally, the *Schad* plurality recognized the due process factor of vagueness. The Due Process Clause:

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[10](...continued)
A "continuing series of violations" means proof of at least three violations of the Federal controlled substances laws *as charged in Counts* ___ of the indictment, and also requires a finding that those violations were connected together as a series of related or ongoing activities as distinguished from isolated and disconnected acts." Pattern Jury Instructions of the District Judges Association of the Eleventh Circuit, Instruction No. 63 (1985). 2 Devitt *et al.*, at 955-57.

> carries the practical consequence that a defendant charged under a valid statute will be in a position to understand with some specificity the legal basis of the charge against him. . . [N]othing in our history suggests that the Due Process Clause would permit a State to convict anyone under a charge of "Crime" so generic that any combination of jury findings of embezzlement, reckless driving, murder, burglary, tax evasion, or littering, for example, would suffice for conviction.

501 U.S. at 633. Justice Scalia, concurring, agreed "that one can conceive of novel 'umbrella' crimes (a felony consisting of either robbery or failure to file a tax return) where permitting a 6-to-6 verdict would seem contrary to due process." *Id.* at 650.

A CCE based on a series of uncharged offenses is just such a novel "umbrella" crime, except the umbrella metaphor needs revising: the number and variety of possible predicate crimes that a CCE can incorporate is just too vast. Unless the "series" crimes are charged as elements and unanimously proved as elements, a CCE is just a generic "big-time drug dealer" crime. In short, the defendant is in no position to "understand with some specificity the legal basis of the charge against him." *Schad*, 501 U.S. at 633.

If, as this Court has noted, rationality is at the heart of due process, *Schad, id.* at 637, there is something disturbingly irrational for a court to require each juror to find beyond a reasonable doubt that a CCE defendant committed at least three predicate offenses but not to require them to agree on the identity of these offenses. This muddled, pick-and-choose use of the reasonable doubt standard in itself "casts too much doubt

on the accuracy of the verdict." *Edmonds*, 80 F.3d at 818 n.10; *see, e.g.*, Scott W. Howe, *Jury Fact-Finding in Criminal Cases*, 58 Mo. L.Rev. 1, 7, 81-83 (1993)(a factual concurrence mandate follows from the *Winship* principle that a conviction must rest on proof beyond reasonable doubt of all the facts necessary to establish the crime).

This Court should therefore conclude that the Fifth Amendment's Due Process Clause and the Sixth Amendment's guarantee of a jury verdict require juror unanimity on the crimes making up the "series of offenses" necessary for a CCE conviction. 21 U.S.C. § 848 is a complex crime requiring proof of a series of other crimes; in this context, a patchwork verdict -- based on twelve individual jurors' idiosyncratic conclusions about which crimes form the "series of violations" -- offends both Congressional intent and due process. Each crime alleged to be one of the necessary "series" is an essential element on which jurors must unanimously agree beyond a reasonable doubt. And they must be so instructed by the district judge.

C. Unanimity Instructions And Special Verdicts

The appropriate procedures by which jury unanimity as to predicates may be enforced while at the same time providing a record of sufficient specificity to enable meaningful appellate review of the jury's factual determinations is for the trial court to give an instruction to the jury that goes beyond the general instruction of unanimity – an instruction directing the jury that it must agree unanimously on the specific predicate acts it deems proven as part of the "continuing series" of violations under CCE or the "pattern of racketeering activity" under RICO. *See United States v. Echeverri*, 854 F.2d 638, 643 (3d

Cir. 1988)("The usual rule that a general unanimity instruction is sufficient gives way 'where the complexity of the case, or other factors, creates the potential that the jury will be confused'")(a specific unanimity instruction is warranted in a CCE case where there was evidence of numerous alleged predicate acts, any three of which could have been the focus of a particular juror and where the complexity and other factors were "obvious").

The district court should also have the discretion to monitor the jury's unanimity determination as to predicates by submitting special verdict forms or special interrogatories by which the jury may indicate which predicates were unanimously agreed upon. *See United States v. Ruggiero*, 726 F.2d 913, 922-23 (2d Cir. 1984); *id.* at 925-28 (Newman, J., concurring in [relevant] part and dissenting part)(the use of special interrogatories as to predicate acts in criminal RICO cases should be encouraged as an aid to meaningful appellate review of complex criminal cases, particularly in the event some but not all predicates are vacated on appeal); Robert M. Grass, Note, *Bifurcated Jury Deliberations In Criminal RICO Trials*, 57 Fordham L. Rev. 745, 752-53 & nn.49-54 (1989)(collecting authorities on special interrogatories in complex RICO prosecutions).

Of course, where predicate acts have been charged as separate substantive counts in an indictment, then general verdicts on the substantive charges would serve the same function as special interrogatories because a general verdict would indicate which of the predicate acts supported the CCE or RICO prosecution. Where the predicates are not separately charged, however, neither the trial court nor the appellate court reviewing the inevitably lengthy trial record would be in a position to meaningfully determine jury unanimity on a

frequently lengthy list of predicates necessary to constitute the requisite "series" or "pattern". *See, e.g., United States v. Palmeri*, 630 F.2d 192, 202-03 (3d Cir. 1980)(jury directed to indicate which of 46 predicates were proven in a multi-defendant RICO case); *United States v. Pungitore*, 910 F.2d 1084, 1136 & n.74 (3d Cir. 1990)(listing predicates); *Ruggiero*, 726 F.2d at 922-23. *See also* Miller, 104 Yale L.J. at 2202-06 & nn.131-148 (collecting authorities).

Certainly, there is more than abundant case law upholding the district courts' requisite discretion to utilize special interrogatories where the "risk of prejudice to the defendant is slight and the advantage of securing particularized fact-finding is substantial". *Ruggiero*, 726 F.2d at 927.

More to the point, this Court may exercise its supervisory power over the federal court system in directing the procedures that may be utilized by the trial courts in the administration of a federal criminal statute. In particular, the Court may require the lower courts under its supervision "to follow procedures deemed desirable from the point of view of sound judicial practice although in nowise commanded by statute or the constitution". *Cupp v. Naughten*, 414 U.S. 141, 146 (1973). This supervisory power extends to jury instructions deemed advisable, though not constitutionally compelled. *United States v. Rubio-Villareal*, 967 F.2d 294, 297 (9th Cir. 1992). *See also* Sara Sun Beale, *Reconsidering Supervisory Power In Criminal Cases: Constitutional And Statutory Limitations On The Authority Of The Federal Courts*, 84 Colum. L. Rev. 1433, 1490-91 (1984)(federal court's exercise of supervisory power appropriate where directed to matters regulating judicial trial procedure).

Accordingly, this Court should direct that trial jurors be instructed that they must be in unanimous agreement as to the predicate acts they are required to find as part of a "continuing series" of violations under CCE or a "pattern of racketeering activity" under RICO. Moreover, the district courts' discretion to utilize special interrogatories at the time the jury returns its verdict should also be sustained.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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